

**U.S. Department of Labor**

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**Issue Date: 06 December 2005**

Case No.: **2005-CAA-00003**

*In the Matter of:*

**SANDEE J. MCCLAIN WEWERS,**  
**Complainant,**

**v.**

**U.S. ENVIRONMENTAL PROTECTION AGENCY,**  
**Respondent.**

Before: **WILLIAM S. COLWELL**  
Administrative Law Judge

*For the Complainant:*  
Sandee J. McClain Wewers, *pro se*, Watkinsville Georgia

*For the Respondent:*  
Karol S. Berrien, Esq., Associate Regional Counsel, U.S. Environmental Protection Agency,  
Atlanta, GA

**RECOMMENDED DECISION AND ORDER**  
**GRANTING THE RESPONDENT'S MOTION FOR SUMMARY DECISION**

This case arises under the employee protection provisions codified in Section 322(a) of the Clean Air Act ("CAA"), 42 U.S.C. 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9610; Section 1450(i)(1)(A-C) of the Safe Drinking Water Act ("SDW"), 42 U.S.C. 300j-9; Section 7001(a) of the Solid Waste Disposal Act ("SWD"), 42 U.S.C. 6971; Section 507(a) of the Federal Water Pollution Control Act ("WPC"), 33 U.S.C. 1367; and Section 23(a) of the Toxic Substances Control Act ("TSC"), 15 U.S.C. 2622. These statutes and their implementing regulations protect employees from retaliation by their employers for engaging in protected activity such as reporting violations of the health, safety or environmental standards contained in these statutes. In this case, the Complainant, Sandee Wewers, has alleged that she engaged in activity protected by these statutes and that the Respondent, U.S. Environmental Protection Agency, retaliated against her in violation of these statutes.

## **STATEMENT OF THE CASE**

### *Background*

The Complainant was a GS-8 Secretary with the Respondent in its Science and Ecosystems Support Division in Athens, Georgia. Resp't Mot. for Summ. Decision, Ex. 1 at 1. On April 14, 2003, the Complainant was selected for a temporary detail opportunity in the Respondent's Office of Policy and Management, Grants and Procurements Branch, Procurement Section, which is in Atlanta Georgia. Resp't Mot. for Summ. Decision, Ex. 4 at 1. This detail was originally scheduled to be for 120 days and was not to continue past August 11, 2003. *Id.* This detail was subsequently extended for approximately 45 additional days and was then not to continue past September 30, 2003 *Id.* at 2.

At the expiration of that extension of the detail, the Complainant was able to obtain another detail for a period of 60 days in the Office of the Regional Administrator, Immediate Office, Environmental Justice Program. *Id.* at 3. When that period ended, the Complainant continued to work in the Environmental Justice Program's offices even though her detail had not been officially extended. *Id.* at 4. Paperwork was later done to document the extension of the Complainant's detail to February 6, 2004, after the fact. *Id.*

The Complainant's second level supervisor, Michael Peyton, Director of the Science and Ecosystems Support Division, instructed the Complainant by e-mail messages on both January 29, 2004 and on February 5, 2004 that she would have to report to her position in the Science and Ecosystems Support Division in Athens, Georgia when this extension of her detail ended on February 6, 2004. Resp't Mot. for Summ. Decision, Ex. 6 at 1 & 3. On February 5, 2004, Peyton also verbally directed the Complainant to report to her position in Athens on Monday, February 9, 2004. Resp't Mot. for Summ. Decision, Ex. 5 at 2.

On Monday, February 9, 2004, the Complainant did not report for duty at her Athens location. Instead, she visited Peyton in his Atlanta office at approximately 11:20 a.m. *Id.* at 3. She showed him a letter faxed to her by Dr. David Jarrett, a psychiatrist. *Id.* The letter stated that the Complainant was "fearful that should she return to work in Athens, she would become so distraught and depressed that she would attempt suicide." Resp't Mot. for Summ. Decision, Ex. 7. The letter also communicated Dr. Jarrett's "medical opinion that the stress of going back to work [in Athens] could be very detrimental to her mental health." *Id.*

### *The Complainant's Discharge*

In a letter dated February 13, 2004, the Complainant was asked to give consent for Dr. Jarrett to discuss her medical information and her psychiatric condition with contract psychiatrists or physicians who could evaluate the information for the Respondent so that an appropriate employment decision could be made. Resp't Mot. for Summ. Decision, Ex. 8. This request was made pursuant to 5 C.F.R. §§ 339.302 and 339.303, which allow such medical investigation when a federal agency needs medical documentation to make an informed management decision. With the letter, the Complainant was provided with a medical authorization and release form to sign. *Id.*

The Complainant was allowed to remain in an approved leave status pending receipt of the signed consent form, and she was given a deadline of February 20, 2004 to return the signed form or be placed in an Absent Without Leave (“AWOL”) Status. *Id.* at 2. Although the Complainant signed the Authorization and Consent form, she crossed out the language on the form that would enable the reviewing psychiatrist to discuss the case with the Complainant’s managers, and she further altered the language of the form to reserve to her the right to choose and approve the reviewing psychiatrist. Resp’t Mot. for Summ. Decision, Ex. 9 at 3-4.

The Respondent wrote to the Complainant again on March 2, 2004 to inform her that the consent form was not negotiable. *Id.* at 1. The Complainant was given until March 9, 2004 to provide a signed and unaltered copy of the form or be placed in AWOL status. *Id.* at 2. The Complainant ultimately provided the signed and unaltered form on or around March 9, 2004. Resp’t Mot. for Summ. Decision, Ex. 5 at 3 and Ex. 10 at 6. On March 29, 2004, the U.S. Department of Health and Human Services’ Federal Occupational Health Services consultant, Dr. Neal Presant, concluded that the Complainant’s medical condition only precluded her from working in the Respondent’s Athens office and that, absent a more significant global impairment, the Complainant was not legally “disabled” in any way that required special accommodation. Resp’t Mot. for Summ. Decision, Ex. 10.

Since the Complainant could not return to her job post in Athens and since the Respondent did not have a position for her in the Atlanta office, the Respondent proposed that the Complainant be removed for inability to perform the duties of her position of record. Resp’t Mot. for Summ. Decision, Ex. 11. The Complainant was notified of this proposed action on May 5, 2004 and was invited to submit materials and evidence in response to the proposed action, if she wished to do so. *Id.* at 2. The Complainant was also allowed to meet with the Regional Administrator, accompanied by her counsel, before the final decision was made. *Id.* The Complainant was placed on paid administrative leave pending a final decision. *Id.* On September 27, 2004, the Complainant was notified of the Regional Administrator’s decision to remove her from her position effective October 1, 2004. Resp’t Mot. for Summ. Decision, Ex. 12 and Ex. 13.

#### *The Complainant’s OSHA Complaints*

During the pendency of the Complainant’s medical evaluation and personnel decision, she filed numerous complaints against the Respondent with the Occupational Safety and Health Administration (“OSHA”) alleging retaliation against her in violation of the environmental statutes set out *supra*. She filed complaints dated March 2, 2004, March 8, 2004, May 10, 2004, July 1, 2004, September 13, 2004, and October 4, 2004. Resp’t Mot. for Summ. Decision, Ex. 14 and Ex. 15.

The Complainant’s first complaint on March 2, 2004 alleged that the Respondent’s letter requiring the Complainant to sign the medical release form or be classified as AWOL was a retaliatory threat. It also contained numerous other allegations related to her job dissatisfaction such as the Respondent “stalling her in a dead-end job,” denying her promotions and training

opportunities, not providing adequate “recognition for her work performance,” and “abruptly and cruelly” ending an “illusory” special detail.

The Complainant’s second complaint on March 8, 2004 added the allegation that the Respondent’s letter informing the Complainant that she could not alter the terms of the medical release form was a “retaliatory” act. The Complainant’s third complaint on May 10, 2004 added the allegation that the Respondent’s letter informing the Complainant of her proposed removal had “threatened” the Complainant “with firing for engaging in protected activity in filing a DOL environmental whistleblower complaint about the hostile work environment.”

The Complainant’s fourth complaint on July 1, 2004 alleged that the Complainant was “publicly humiliated” by being asked to comply with procedures for signing into the building to meet with the Regional Administrator. It also alleges that the counsel for the Respondent “smirked or smiled inappropriately” at that meeting.

The Complainant’s fifth complaint on September 13, 2004 added the allegation that the Regional Administrator’s decision to remove her was retaliatory. The Complainant’s sixth and final complaint on October 4, 2004 alleged that the Respondent’s moving up the effective date of her termination from November 6, 2004 to October 1, 2004 was also retaliatory.

The first five of the Complainant’s complaints were addressed and dismissed by OSHA in a decision letter dated September 29, 2004. Resp’t Mot. for Summ. Decision, Ex. 14. The sixth and final complaint was addressed and dismissed by OSHA in a decision letter dated October 7, 2004. Resp’t Mot. for Summ. Decision, Ex. 15. OSHA dismissed all of the Complainant’s complaints, because it found that they failed to “address safety or environmental issues” and were, therefore, “not covered under the environmental laws.” *Id.* at 2. Additionally, OSHA noted that the Complainant’s complaints were “without supporting evidence” and “failed to make a prima facie complaint” under the applicable environmental statutes. Resp’t Mot. for Summ. Decision, Ex. 14 at 2.

#### *The Complainant’s Appeal to the OALJ*

On October 12, 2004, the Complainant appealed OSHA’s dismissals and requested a hearing before the Office of Administrative Law Judges (“OALJ”), U.S. Department of Labor. The case was docketed, and I issued an initial notice of hearing on October 22, 2004 setting a hearing in this matter for January 5, 2005. At the request of both parties, I issued an order on December 21, 2005 granting a continuance and rescheduling the hearing for May 17, 2005. On March 11, 2005, I issued an order at the request of the Complainant granting another continuance; the hearing was rescheduled for August 9, 2005. In this order, I also set a deadline of May 27, 2005 for the submission of dispositive motions, a deadline of June 17, 2005 for any briefs in response to dispositive motions, and a deadline of June 30, 2005 for any briefs in reply to such responses.

On May 26, 2005, the Respondent submitted a Motion for Summary Decision under 29 C.F.R. § 18.40. The Complainant neither submitted a responsive brief by the June 17, 2004 deadline nor requested an extension of time in which to do so. On June 27, 2005, I instructed my

legal assistant to follow up with the Complainant to see if she would be submitting anything in response to the Respondent's Motion for Summary Decision. My legal assistant called the Complainant on June 27, 2005 and emailed her on June 29, 2005. The only response from the Complainant was a voicemail and an email on June 29, 2005 indicating that she was close to retaining a new attorney. No further communication was received from the Complainant. On July 13, 2005, I issued an order canceling the scheduled hearing pending my decision on the Respondent's Motion for Summary Decision.

## **DISCUSSION**

### *Standards for Summary Decision*

Motions for summary decision in proceedings before an Administrative Law Judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).<sup>1</sup>

If the moving party can establish that there is no genuine issue of material fact and that they are entitled to summary decision, the burden is shifted to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Electric Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 4 (ARB May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden, but rather, must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to meet this burden as to any of the required elements of his case, all other factual issues become immaterial and there can be no genuine issue of material fact. *Id.*, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

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<sup>1</sup> The Eleventh Circuit, under whose jurisdiction this case falls, has held that "a motion for summary judgment should only be granted against a litigant without counsel if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default." *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287, 289 (11th Cir. 1992).

The Complainant is a litigant without counsel in this case, and although she was not given special notice or explanation specifically about motions for summary decision, she was provided with continuances, extensions of time to complete discovery, offers of time to obtain an attorney, follow up contacts to see if she had obtained an attorney or was planning to, and three phone conferences with the Respondent and myself to discuss pretrial issues in the case. Moreover, the Complainant's own deposition testimony makes it clear that there are no materials she could submit which would alter the outcome of this decision.

In light of the extensive help with which the Complainant has already been provided, no further assistance or explanation would improve the protection of her rights, and in light of the unavoidable one-sidedness of the issues in this case, no additional affidavits or materials would alter the outcome of this decision.

As discussed *supra*, the three issues in a whistleblower case are whether (1) the Complainant has engaged in protected activity of which the Respondent was aware, (2) whether the Complainant has suffered adverse employment action, and (3) whether a nexus exists between the protected activity and the adverse employment action. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ No. 2000-CAA-20, slip op. at 6 (ARB June 30, 2004). If the Respondent can demonstrate that no genuine issue of material fact exists as to any of these three issues and the Complainant cannot put forth any specific facts that would establish a genuine issue of material fact, then the Respondent is entitled to decision as a matter of law.

### *Protected Activity*

The first of the three required elements of a complainant's prima facie case under the environmental whistleblower statutes is "protected activity." *Id.* In this case, the Complainant had difficulty describing what protected activity, if any, she had engaged in while working for the Respondent. Most of her comments in her complaints, her deposition, and her interrogatories were directed towards her general dissatisfaction with her job, her coworkers, and her attempts at advancement. During her deposition, exchanges such as the following one between the Complainant and counsel for the Respondent were common:

- Q. What activity did you engage in that you're alleging was protected under environmental protection statutes?
- A. I don't know how to answer that. I don't know how to answer that whether it's being protected activity.
- Q. Did you engage in any protected activity?
- A. It depends on what you define as protect – what is protected activity.
- Q. Well, you brought the complaint, Ms. Wewers. So –
- A. Under counsel.
- Q. Are you saying that you don't know what you did, that counsel told you –
- A. No.
- Q. – to say that you engaged in protected activity without you knowing?
- A. I'm sorry. What was that? Please repeat it, because it sounded –
- Q. You brought the complaint. In order for you to bring a complaint, you must have felt, as you said, someone had wronged you. Okay. So you alleged that you were being retaliated against.

A. Yes.

Q. For what?

A. I was retaliated against for – for – actually for trying to clarify a position.

Resp't Mot. for Summ. Decision, Ex. 19 at 27-28. Attempting to "clarify a position" is one of the only two specific activities that the Complainant cited as protected activity that spurred the alleged retaliation against her. I will address each of these two allegedly protected activities in turn.

### *Clarifying a Position*

In her deposition, the Complainant explained her reference to clarifying a position to mean having a discussion with an EPA Human Resources Classification Specialist, Tena McPhail, about what classification an upcoming job opening would be given. *Id.* at 29 & 98-100. The Complainant alleges that she had been promised a job opening of a certain type and level created specifically for her but that the job opening was ultimately posted with a different type and a lower level than the one allegedly promised. *Id.* at 29-30 & 32-33. She contends that this was done in retaliation for her discussion with McPhail about the classification of the position and her revelation to McPhail that she had already been performing much of the field work that the new position would require, despite the fact that such field work was outside of her current Position Description as a Secretary. *Id.* at 28-35.

To constitute protected activity under the environmental whistleblower statutes, an employee's acts must implicate environmental safety "definitively and specifically." *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). The Complainant's attempt to "clarify a position" in this situation does not implicate environmental safety in any way. Regardless of the actual motivations of the parties involved, the posting and classification of job openings has no effect on environmental safety in these circumstances. Because it does not touch on environmental safety issues in any way, the Complainant's activity in this situation cannot qualify as protected activity under the applicable environmental whistleblower statutes.

### *Complaining about the Lack of a Safety Plan*

In this case, the second protected activity in which the Complainant claims she engaged was the voicing of a concern over not being given a safety plan before she visited a Superfund Site in Alabama to take samples from caustic ponds. Resp't Mot. for Summ. Decision, Ex. 19 at 35. When determining whether a complainant has engaged in protected activity, however, an important distinction must be made between activity related to environmental safety violations and activity related to occupational safety violations. *Tucker v. Morrison & Knudson*, ARB No. 96-043, ALJ No. 94-CER-1, slip op. at 5 (ARB Feb. 28, 1997). Only activity related to environmental safety violations is protected by the environmental whistleblower statutes. *Id.*

In *Tucker*, an employee working at a Superfund Site made various complaints about violations of safety procedures at the site. *Id.* at 2-3. The Administrative Review Board (“ARB”) concluded that his complaints were not protected activity, because the safety violations of which he complained did not implicate the safety of the environment, but rather the occupational safety of the workers. *Id.* at 5. The ARB explained that “the environmental whistleblower provisions are intended to apply to environmental, and not other types of concerns.” *Id.*

In this case, the Complainant testified in her deposition that she was taken to an Alabama Superfund Site and “put into a boat on two cooling ponds” without having seen a “safety plan” or a “work plan” to tell her what she would be doing at the Site. Resp’t Mot. for Summ. Decision, Ex. 19 at 36. She testified further that “if [she] had known that’s what [she] was going to be doing, [she] would have brought more protective clothing.” *Id.* This alleged failure of the Respondent to provide a safety plan before the Complainant visited these ponds is a safety issue only for employees working on the Site and not for the environment. Just as in *Tucker*, this alleged safety violation affects only occupational safety and not environmental safety, and so, just as in *Tucker*, the Complainant’s complaints about the alleged safety violation cannot qualify as protected activity under the applicable environmental whistleblower statutes.

#### *Other Protected Activities*

After explaining her activities related to clarifying a position and voicing her concern about the lack of a safety plan, the Complainant was asked by counsel for the Respondent if there were any other protected activities in which she had engaged:

Q. Any other protected activities that you’ve engaged in?

A. I’m not sure how to answer that. I mean I – I’ve –

Q. It’s not a trick question. Have you engaged in other protected activities?

A. Well, I’m not sure how to say that – I guess I reserve the right to add something. I – and I’ll do that.

*Id.* at 41. Although she reserved the right to, the Complainant never submitted any statements or materials of any kind to expand upon her statements during her deposition or to respond to the Respondent’s Motion for Summary Decision. The two allegedly protected activities discussed *supra* are, therefore, the only ones relevant to this decision on the Respondent’s Motion for Summary Decision.

#### *Conclusion*

The Respondent has met its burden of demonstrating the non-existence of any genuine issues of material fact and establishing its entitlement to judgment as a matter of law. Because the Complainant has failed to put forth any specific facts that could establish any genuine issue of material fact as to whether or not she engaged in any protected activity, no genuine issue of



material fact can exist as to any of the other elements of her claim. *Seetharaman*, ARB No. 03-029, slip op. at 4, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Thus, the Respondent is entitled to judgment as a matter of law.

### **RECOMMENDED ORDER**

It is hereby RECOMMENDED that Summary Decision be GRANTED for the Respondent.

**A**

WILLIAM S. COLWELL  
Administrative Law Judge

WSC/MAWV

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s Recommended Decision and Order. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s recommended decision becomes the